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No. 85-253

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK MARINE MANAGERS, INC.,
Petitioner,

vs.

HELENA MARINE SERVICE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

BRIEF OF RESPONDENTS CONSOLIDATED GRAIN AND BARGE COMPANY AND FEDERAL INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a District Court sitting in admiralty has discretion to fashion equitable relief in a declaratory judgment action brought by a marine insurance underwriter and to balance competing interests by ordering the underwriter to deposit the proceeds of said policy into the registry of the Court and thus relieve itself of liability under the policy beyond the policy limits while at the same time preserving the assets of the policy from dissipation under the circumstances of the case.

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Because the decision of the United States Court of Appeals for the Eighth Circuit in this case involves none of the criteria warranting review, Respondents Consolidated Grain and Barge Company (Consolidated) and Federal Insurance Company (Federal)[1] respectfully request that this Court deny the Petition of New York Marine Managers, Inc. (New York) for a Writ of Certiorari.

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[1] Consolidated Grain and Barge Company is a privately-owned corporation. Federal Insurance Company is a wholly-owned subsidiary of Chubb Corp., which is a publicly-owned corporation. Neither of these Respondents believes that it has any subsidiaries or affiliates within the meaning of Supreme Court Rule 28.1.

OPINIONS BELOW

The opinions below are contained in the appendices to the Petition for Certiorari. Appendix "A" is the denial by the Court of Appeals for the Eighth Circuit of Petitioner's Application for a Rehearing En Banc. Appendix "B" is the decision of the Court of Appeals for the Eighth Circuit filed on March 29, 1985. Appendix "C" is the order of the District Court of January 24, 1985. Appendix "D" is the Order of Remand of the Court of Appeals of December 20, 1984. Appendix "E" is the Order Granting Motion of Helena Marine Service, Inc. and Pendleton Harbor Service, Inc., for Further the Injunctive Relief dated November 26, 1984. Appendix "F" is the Judgment in favor of Helena Marine Service, Inc. and Pendleton Harbor Service, Inc., entered on July 13, 1984. Appendix "G" is a transcript of the oral Findings of Fact and Conclusions of Law given by the District Court on July 3, 1984.

All of these opinions and Orders appear as A-1 through A-32 to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioner seeks review of a decision holding that a District Court sitting in admiralty has discretion to fashion equitable relief in a declaratory judgment action brought by Petitioner, a marine insurance underwriter, by ordering the underwriter to deposit the proceeds of the subject policy into the registry of the Court and thus relieve the insurer of potential liability beyond the policy limits in circumstances where the policy limits are insufficient to cover the claims asserted by injured parties and the policy limits are being depleted by the insured's protracted litigation.

THE FACTS

Helena Marine Service, Inc. (Helena) and Pendleton Harbor Service, Inc. (Pendleton), a wholly owned subsidiary of Helena, owned and operated a barge fleeting facility at or about Mile 25-26 on the Arkansas River. On December 4, 1982, a fleet breakaway occurred in which many barges under the sole care, custody and control of Helena and Pendleton broke loose and drifted downstream unattended causing extensive damage. Injured parties, such as Consolidated and Federal, include barge owners and operators whose barges were moored in the fleet, the cargo owners, insurers of barges and cargo and the United States, which owned and operated Dam No. 2 below the fleeting area which was struck by breakaway barges and participated in salvaging barges after the casualty.

Petitioner, New York, is the marine umbrella or bumbershoot liability underwriter of Helena/Pendleton and insures Helena/Pendleton against marine liabilities in respect to the fleeting facility and certain vessels owned or chartered by Helena/Pendleton. The policy limit is $5,000,000, which is excess over a policy of primary marine insurance in the amount of $1,000,000, the total insurance of Helena/Pendleton in respect to this casualty being $6,000,000. Total claims by injured parties including the United States exceeded $12,000,000.

On June 3, 1983, Helena/Pendleton filed four limitation of liability proceedings under the provisions of 46 U.S.C. 183, et seq, and Rule F, Supplemental Rules for Certain Admiralty and Maritime Cases. On the same date, Helena and Union National Bank of Little rock filed a fifth limitation of liability proceeding concerning certain barges owned by Union National Bank of Little Rock and chartered to Helena. Upon presentation of alleged ad interim stipulations ostensibly providing the injured parties with the security required by Rule F(1) for the respective limitation proceedings, the District Court entered injunctions prohibiting the injured parties from prosecuting their claims

outside the limitation proceedings. Although the ad interim stipulations were carefully drafted in the customary form, a detailed reading revealed that they provided no meaningful security as they merely assigned the proceeds of Helena's bumbershoot insurance policy issued by New York. New York signed each of the ad interim stipulations.

Claimants filed motions to require adequate security for the limitation actions. While the Motions of the Claimants were pending, New York, without notice to the Claimants, filed a declaratory judgment action against Helena/Pendleton seeking a declaration that New York was not required under the terms of the bumbershoot policy to post limitation surety bonds for Helena/Pendleton and such further relief as the court deemed proper. Helena/Pendleton filed a cross action seeking a declaration that the policy required New York Marine to post such limitation bonds. This matter was heard in a different division of the Eastern District of Arkansas than the division in which the limitation proceedings were pending and before a different judge and were not consolidated with the limitation actions. The Claimants in the limitation actions, including Consolidated and Federal, were not informed of the pending declaratory judgment action nor, of course, were they parties to nor did they participate in the trial of such action. The District Court in the declaratory judgment action entered judgment for Helena/Pendleton and required New York to post the necessary limitation surety bonds (Appendix F and G to Petition).

On appeal to the United States Court of Appeals for the Eighth Circuit, New York argued principally that the District Court's Order might have the potential of subjecting New York to the risk of extension of the bumbershoot policy limit of $5,000,000 (A-17 to Petition). In addition to this concern, the Court of Appeals stated that it was troubled also by the fact the Claimants in the limitation actions were not made parties to the action and "their views have not been heard" (A-17 to Petition). The Court of Appeals remanded the case to the District Court directing that the declaratory judgment action be

consolidated with the limitation of liability actions currently pending in the same Eastern District of Arkansas. The Court further ordered an expedited hearing to be held in which all Claimants would be directed to participate and express their views on the issues raised in the case. The Court further ordered the District Court to determine whether posting limitation bonds by the bumbershoot underwirtier would subject New York to liability beyond the policy limits and, if so, to enter an amended Order eliminating the danger to New York. In connection with this last direction, the Court of Appeals stated:

> "In reaching its decision, the District Court shall consider the advisability of requiring the bumbershoot underwriters to post the entire amount of the proceeds then available under the policy ($5,000,000 less whatever amounts have already been paid under the policy) with the proviso that the bumbershoot underwriter's liability as to both limitable and non-limitable claims may not extend beyond the amount posted." (A - 18 to Petition)

On remand, Judge Howard, the judge before whom the limitation actions were pending, heard the consolidated case. As part of his Order (and in conformance with the instructions of the Court of Appeals) and within his discretion in equity, the Court ordered the underwriter New York to deposit immediately in the registry of the Court the $5,000,000 policy limit minus whatever disbursements the underwriter had made from such coverage to the owners or in their behalf in these proceedings. Judge Howard held that the deposit would have the effect of relieving the underwriter of any further liability under its policy, the very objective sought by New York in filing the declaratory judgment action. The Court specifically stated "To reiterate, once this sum has been deposited, the underwriter's liability as to both limitable and non-limitable Claimants shall not extend beyond the amount deposited." (A - 15 to Petition)

Judge Howard's Order of January 24, 1985 was appealed by New York on the ground that it was error to compel the deposit

of New York's policy proceeds, less disbursements. The Court of Appeals for the Eighth Circuit affirmed Judge Howard's Order compelling New York to deposit its policy proceeds, with the proviso that the issue of whether disbursements made under the policy were proper would be preserved for future determination by the District Court. The Court of Appeals stated:

> "We find that requiring New York Marine to deposit the policy proceeds is within the equitable powers of the District Court sitting in admiralty and not an abuse of discretion under the circumstances of this case. A limitation proceeding is "the administration of equity in an admiralty court" and "all the ease with which rights can be adjusted in equity is intended to be given to the proceeding." ' Citing *Moore-McCormack Lines, Inc. v. Richardson,* 295 F.2d 583, 597 (2nd Cir. 1961), cert. denied, 368 U.S. 989 (1962) (citations omitted)", (A-8-9 to Petition).

It is important to note that under New York's policy legal expenses and related costs incurred on behalf of the insureds are deducted from the policy coverage available to the injured parties (Claimants). Consolidated, Federal and other injured parties successfully argued to the District Court and the Court of Appeals that New York and its insureds were able to pursue a course of endless litigation and delay because, so long as they controlled the insurance fund, they were able to fund their litigation from insurance proceeds that should be preserved for the injured parties. Since available insurance fell far short of the claims of the injured parties, New York and its insureds had no incentive to control costs or bring the litigation to a conclusion. They were, in effect, spending someone else's money. The Courts below properly concluded that this highly improper situation could only be rectified if the insurance fund were brought under the Court's control, and that a Court of equity had authority to order such a provisional remedy.

The order compelling the deposit of the insurance fund does not preclude New York from recovering the fund, plus interest,

in the event that the Court exonerates New York's insureds from liability when the case is decided on the merits. Under the terms of the Order the fund is merely held by the Court, and earning interest, for the benefit of whatever parties prevail. If New York's insureds are exonerated or their liability is determined to be less than the fund deposited plus interest acrued, New York will be entitled to the remaining proceeds.

The mandate of the Court of Appeals was issued in due course and New York has deposited in the registry of the Court the sum of $4,576,126.99, representing the policy limits minus certain disputed disbursements. After such deposit, New York filed this Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Complaint filed by New York under the Declaratory Judgment Act, 28 U.S.C. 2201, et seq, and Rule 57, F.R.C.P., also invoked the admiralty and maritime jurisdiction of the Court pursuant to Rule 9(h) FRCP and 28 U.S.C. 1333. Helena/Pendleton's Counterclaim was based on the same jurisdictional authority. Under the Declaratory Judgment Act, the Court has clear authority to issue such relief as may be appropriate and the Declaratory Judgment Act is to be broadly construed.

New York has invoked the Court's admiralty jurisdiction and it is well settled that an admiralty court is a court of equity. The powers of equity are weighty and are designed to remedy the type of unusual situation which existed in the instant case. Courts acting in equity have broad power to fashion a remedy which does complete justice and to adapt the decree to the necessities of a particular case.

The judgment of the Court of Appeals for the Eighth Circuit properly balanced competing equities by protecting the marine underwriter against its fear of exposure to liability in excess of the policy limits while at the same time protecting the limitation

claimants from the real risk that the proceeds would be dissipated in derogation of their rights.

The contention of Petitioner that the action of the Court of Appeals for the Eighth Circuit "so far departs from the accepted and usual course of judicial proceedings and so far sanctions such a departure by a lower Court, as to call for an exerecise (sic) of this Court's power of supervision" misses the mark (Petition - 5). Through the machinations of New York, the assureds Helena/Pendleton and the primary insurance underwriter, the Court was faced with an unusual and novel set of circumstances that called for the fashioning of a decree which would satisfy the competing interests and at the same time do justice to the parties. Acting under the broad powers of the Declaratory Judgment Act and the broad equity powers of an admiralty court, the Court properly exercised its discretion in the total judgment which it rendered including particularly the Order that New York should deposit its policy proceeds into the registry of the Court. It was not a departure from the accepted and usual course of judicial proceedings nor did the judgment of the Court of Appeals sanction such a departure by a lower Court. The Decree was within the discretion of the Court under the Declaratory Judgment Act and the equity powers of the Court sitting in admiralty.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Authority For The Judgment Of The Court Of Appeals For The Eighth Circuit Can Be Found Both From The Language Of The Declaratory Judgment Act And From The Well Established Equitable Powers Of The Court That Sits In Admiralty.

The instant case was filed by New York pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. 2201, et seq, and Rule 57, FRCP, and pursuant to the admiralty and maritime jurisdiction of the Court under Rule 9(h), FRCP, and 28 U.S.C. 1333. Helena/Pendleton's Counterclaim also invoked the Court's jurisdiction under the same statutes and rules. Authority for fashioning of such equitable relief as found in the Court of Appeals per curiam Order affirming the lower Court is derived both from the language of the Declaratory Judgment Act and from the well established equitable powers of a Court sitting in admiralty. The Declaratory Judgment Act states at Section 2202 that "Further necessary or proper relief based on a declaratory judgment or a decree may be granted." Such relief need not be pleaded to be obtained. *Edward B. Marks Music Corporation v. Charles K. Harris Music Publishing Company,* 255 F.2d 518, 522 (2nd Cir. 1958). The Declaratory Judgment Act is to be broadly construed. *Sherwood Medical Industries v. Deknatel, Inc.,* 512 F.2d 724, 729 (8th Cir. 1975). One of the objects of the Declaratory Judgment Act is to "afford a new form of relief where needed". *Home Indemnity Company, New York v. Lechner,* 191 F.Supp. 116, 119 (S.D. Cal. 1961). It is submitted that the Order was well within the purview of the Declaratory Judgment Act.

Equally important is the fact that admiralty courts exercise equitable powers. *Vaughan v. Atkinson,* 369 U.S. 527, 530 (1962); *Pizani v. M/V COTTON BLOSSOM,* 669 F.2d 1084, 1089 (5th Cir. 1982). The District Court below sitting in admiralty had broad power to fashion a remedy which did complete justice and to fashion the decree to the necessities of the

case. *Crawford v. Janklow,* 733 F.2d 541 (8th Cir. 1984); *Porter v. Warner Holding Co.,* 327 U.S. 395 (1946).

The Order of the Court of Appeals was virtually a textbook example of a proper equity decree baiancing competing interests and arriving at an equitable solution. New York Marine was fearful that it might be exposed to extension of the bumbershoot policy limits of $5,000,000. (A-17 to Petition). This reasonable and well-founded fear was resolved by the District Court in its judgment that once New York Marine deposited the policy limits of $5,000,000 (minus disbursements) the liability of New York Marine as to both limitable and non-limitable claimants would be ended and could not extend beyond the amount deposited. The Eighth Circuit found that requiring New York Marine to deposit the policy limits was within the equitable powers of the District Court sitting in admiralty and not an abuse of discretion "under the circumstances of this case." (A - 8-9) On the other hand, the Claimants, both private Claimants and the United States, were fearful that the policy limits of $5,000,000 would be dissipated and not available for payment to Claimants, which was the purpose for which the insurance was intended. That reasonable fear was also satisfied by the Order requiring New York Marine to deposit the policy limits into the registry of the Court. The disposition of the fund deposited (plus interest earned) was to await the outcome of litigation on the merits of the case, insuring that New York could recover part or all of the fund deposited plus interest if its insureds were exonerated or their liability was determined to be less than the fund held by the Court for the benefit of all parties. Last, Helena/Pendleton could be satisfied that the policy limits were to be used for their intended purpose once they had been deposited into the registry of the Court.

In short, the District Court decree affirmed by the Eighth Circuit balanced the competing interests and arrived at an equitable solution taking care of each of those interests.

2. The contention of Petitioner that the Order of the Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings, and so far sanctions such a departure by a lower court as to call for an exercise of this Court's power of supervision is unfounded.

In its Petition for a Writ of Certiorari New York attempts to portray the decision in this case as a precedent shattering ruling. The reality is much different. The Eighth Circuit opinion was well within the discretion allowed by this Court in fashioning equitable decrees by a Court sitting in admiralty. *Vaughan v. Atkinson, supra; Porter v. Warner Co., supra.* The judgment was well within the purposes outlined in the Declaratory Judgment Act, 28 U.S.C. 2201, et seq, which are to provide a just and complete determination of the entire controversy.

The case does not involve any departure from "the accepted and usual course of judicial proceedings" nor has it "so far sanctioned such a departured by a lower court" calling for an exercise of this Court's power of supervision. In essence, the case merely involves a three cornered dispute among the insurance underwriter, the assureds and the claimants. The decree fashioned by the District Court and affirmed by the Court of Appeals satisfies all three corners of this dispute in an equitable manner.

3. Arkansas law regarding direct actions against insurers is immaterial.

This case does not involve a direct action against a liability insurer by injured parties and New York's citations to Arkansas law on such direct actions are misplaced. The Order of January 24, 1985, affirmed by the Court of Appeals, arose from a declaratory judgment action voluntarily filed by New York. Claimants, who suffered extensive losses in the casualty of December 4, 1982, never filed a direct action against New York

and the Arkansas law on direct actions has nothing to do with the issue before this Court. The issue is not who can sue whom, but whether in the circumstances of this case the Court had authority to order insurance proceeds held in the registry of the Court for the benefit of whatever parties prevail on the merits of the case.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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